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No. 99-1565

IN THE

Supreme Court of the United States

AMERICAN AIRLINES, INC.,
Petitioner,

v.

MARIA V. CRUZ, ET AL.,
Respondents.

On Petition for a Writ Of Certiorari To The United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITIONER

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April 24, 2000

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF THE AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF THE PETITIONER

The Air Transport Association of America ("ATA"), having been unable to secure the consent of the respondents, respectfully moves the Court under Sup. Ct. R. 37.2(b) for leave to file the attached brief *amicus curiae* in support of the petition for a writ of certiorari in this case.

The ATA is an association of all major domestic air carriers and five foreign air carriers.[1] Its principal purpose is to support its members by promoting airline safety and advocating common industry positions. Since its inception in 1936, the ATA has been deeply involved in the development of international law governing international air transportation. It has filed briefs *amicus curiae* in, among other cases, *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155 (1999), and *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243 (1984), both involving the construction of the Warsaw Convention.

The decision below causes grave concern to the ATA's members. It overturns decades of established industry practice approved by the Executive Branch, and exposes the airlines to extensive litigation and vast liabilities – all in pursuit of a supposed requirement that the court of appeals itself acknowledged "makes little real sense" and has "no apparent purpose." Pet. App. 7a. If allowed to stand, the decision will senselessly harm the airlines and raise the cost of air travel for their passengers.

Furthermore, ATA members engaging in foreign air commerce rely on the uniform system of liability rules established by the Warsaw Convention. The conflicting decisions of the lower courts regarding their liability disrupts this reliance and defeats "the Warsaw Convention's stated purpose of achieving uniformity of rules governing claims arising from international air transportation." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 552 (1991).

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[1] The ATA's 23 U.S. members are Airborne Express, Alaska Airlines, Aloha Airlines, America West Airlines, American Airlines, American Trans Air, Atlas Air, Continental Airlines, Delta Air Lines, DHL Airways, Emery Worldwide, Evergreen International, Federal Express, Hawaiian Airlines, Midwest Express, Northwest Airlines, Polar Air Cargo, Reeve Aleutian Airlines, Southwest Airlines, Trans World Airlines, United Airlines, United Parcel Service, and US Airways. The ATA's associate, foreign-flag members are Aeromexico, Air Canada, Canadian Airlines International, KLM-Royal Dutch Airlines, and Mexicana Airlines.

The attached brief supplements rather than duplicates the petition. It demonstrates that the court of appeals misconstrued Article 4(4) of the Convention by relying on a word in the American text that does not appear in the governing French text, and by failing to consider the Executive Branch's long-standing contrary interpretation of that provision. The brief also brings to the Court's attention the impact of the case at bar on other pending and possible class actions against the carriers.

For the foregoing reasons, the motion for leave to file the attached brief should be granted.

Respectfully submitted,

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BRIEF OF THE AIR TRANSPORT ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER[1]

INTRODUCTION AND SUMMARY

The court below, declaring itself locked in by Warsaw Convention language it found "unyielding," imposed on air carriers a requirement that the court itself considered purposeless and that the airline industry, with the approval of the Executive Branch, has not considered applicable for decades. We show in

[1] No counsel for any party had any role in authoring this brief, and no person other than *amicus curiae* made any direct monetary contribution to its preparation or submission. Although the petitioner is a member of the ATA, it made no special contribution to the preparation of this brief.

Part I that the court of appeals erred in its view of the language at issue, in particular by disregarding the controlling French text, which does not even contain the word the court of appeals deemed dispositive. Our examination demonstrates that Article 4(4) of the Convention is in fact susceptible of different interpretations, which then permissibly leads us to Part II, where we show that the federal regulators of the airline industry have approved of the airlines' practice under Article 4(4) since at least the 1970's. That interpretation by the Executive Branch is entitled to "great weight" under this Court's decisions, *e.g.*, *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961), and strongly supports the conclusion that the court of appeals' contrary interpretation was incorrect.

In Part III, we urge the Court to grant review here notwithstanding the effect of the Montreal Protocol No. 4 on future cases. As a doctrinal matter, the decision below creates a disturbing lower court conflict over the construction of the Warsaw Convention. Moreover, as a practical matter, the decision will breathe life into existing class actions against the airlines for conduct approved by their regulators and invite new suits potentially involving thousands of claims.

ARGUMENT

I. THE COURT BELOW ERRED IN RULING THAT ARTICLE 4(4) IS UNAMBIGUOUS

This case turns on the meaning of Article 4(4) of the Warsaw Convention,[2] which in the American translation of the governing French text provides that

> if the carrier accepts baggage without a baggage check having been delivered, or if the baggage check does not contain the particulars set out at (*d*), (*f*), and (*h*) above, the carrier shall not be entitled to

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[2] Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, 49 Stat. 3000, T.S. 876 (1934), *reprinted in* 49 U.S.C. app. § 1502 note.

> avail himself of those provisions of the convention which exclude or limit his liability.

The "particular" set out at Article 4(3)(*f*) is "[t]he number and weight of the packages." As a matter of consistent practice for many years, and with the knowledge and approval of the Executive Branch (see *infra*), U.S. airlines typically have not recorded the weight of passengers' baggage on the baggage check, but instead have followed a practice – beneficial to passengers – of assuming that each piece of baggage weighs the maximum amount permitted by the airline's tariff without incurring excess weight charges. By doing so, they have allowed passengers with baggage weighing far less than the maximum allowed under the carriers' tariff to receive a much higher level of compensation than they would otherwise be entitled to under the Convention.[3] The question is whether this benevolent practice strips the airlines of their limited liability under the Convention.

The district court ruled that, because the text of Article 4(4) joins the enumerated particulars with the conjunction "and" rather than "or," "the plain language of this provision directs that liability is lifted only if all three particulars are missing." Pet. App. 22a-23a. The court of appeals found that this interpretation was "linguistically possible," but not "reasonable." *Id.* 6a. Its contrary linguistic analysis consisted entirely of one conclusory sentence:

> It is rather clear to us that the word "and" means that Article 4(4) of the Convention obliges a carrier to comply with each of the three particulars. *Id.*

The court of appeals' conclusion that Article 4(4) has a single "unyielding" meaning (*id.* 7a) is incorrect. It is an *ipse dixit* rather than analysis, simply backhanding another interpretation the court

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[3] The average checked bag weighs 25 pounds and bags "rarely" exceed 30 pounds, far below the industry standard weight limit of 70 pounds. U.S. Department of Transportation Order 89-10-15, 1989 DOT Av. LEXIS 657 *4-*5 (1989).

itself acknowledged the language could bear. More importantly, it rests entirely on the meaning the court gave to the word "and" in the text, a word that does not even appear in "[t]he governing [French] text of the Convention." *Air France* v. *Saks*, 470 U.S. 392, 397 (1985). "Because the only authentic text of the Warsaw Convention is in French, the French text must guide our analysis." *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 535 (1991).

The French text of Article 4(4) contains no conjunction between the particulars listed in 4(3) (*d*), (*f*), and (*h*). It reads:

> [S]i le transporteur accepte les bagages sans qu'il ait été délivré un bulletin ou si le bulletin ne contient pas les mentions indiquées sous les lettres d), f), h), le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

The absence of any conjunction in the French text means that "the original French can be read either disjunctively or conjunctively." *Distribuidora Dimsa* v. *Linea Aerea del Cobre*, 976 F.2d 90, 96 (2d Cir. 1992) (construing Article 8's list of "particulars," which also contains no conjunctions). It lends added credence to the district court's interpretation of Article 4(4) and, at the very least, saps the appellate court's contrary interpretation of inevitability.

A comparison of Article 4 with Articles 8 and 9, dealing with air waybills for cargo, further undermines the court of appeals' conclusion. Article 8, the analogue to Article 4(3), sets out the "particulars" required to be included in air waybills, and Article 9, the analogue to Article 4(4), sets out the consequences for not listing those particulars. Article 9 provides in pertinent part that

> if the air waybill does not contain all the particulars set out in article 8 (*a*) to (*i*), inclusive, and (*q*), the carrier shall not be entitled to avail himself of the

> provisions of this convention which exclude or limit his liability.[4]

The language in Article 9, using the terms "all," "inclusive," and "and," is quite different from the language of Article 4(4), which contains none of those words. That difference strongly suggests that the drafters meant for Article 4(4) to be interpreted differently from Article 9, and lends further support to the district court's interpretation of Article 4(4) as requiring a three-fold failure to forfeit the Convention's protection. See *Bates* v. *United States*, 522 U.S. 23, 29 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)).[5]

At the very least, these considerations – the governing French text of Article 4(4) and the differing text of Article 9 – should have lifted the appellate court's eyes from the page. That is especially true when the result it reached (a) enforces a

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[4] The French text of Article 9 reads, in pertinent part: "Si * * * une lettre de transport aérien * * * ne contient pas toutes les mentions indiquées par l'article 8 [a) à i) inclusivement et q)], le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité."

[5] *Accord Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 338 (1994); *Keene Corp.* v. *United States*, 508 U.S. 200, 208 (1993) (noting the Court's "duty to refrain from reading a phrase into the statute when Congress has left it out."); 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.06 (6th ed. 2000) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the court assumes different meanings were intended" and "where the legislature has carefully employed a term in one place and excluded it in another, it should not be implied where excluded."); see also 87 C.J.S. Treaties § 13 (1954) (rules for construing treaties are similar to those for statutes); 1A Norman J. Singer, *Sutherland Statutory Construction* § 32.09 (5th ed. 1993) (same).

"purposeless" requirement, (b) flouts this Court's oft-repeated command that "treaties are construed more liberally than private agreements," and (c) disregards the Convention's "primary purpose of * * * limiting the liability of air carriers." *Floyd*, 499 U.S. at 535, 546 (interior quotations and citations omitted).

In particular, the court of appeals should have considered, among the additional available aids to construction, the Executive Branch interpretation of Article 4(4). We turn now to that subject.

II. THE EXECUTIVE BRANCH HAS LONG APPROVED OF THE AIRLINES' INTERPRETATION OF ARTICLE 4(4)

The Executive Branch's interpretation of treaties "is given great weight." *Kolovrat* v. *Oregon*, 366 U.S. 187, 194 (1961); see also *El Al Israel Airlines, Ltd.* v. *Tseng*, 525 U.S. 155, 168 (1999) (citing *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 184-85 (1982)) ("Respect is ordinarily due the reasonable views of the Executive Branch concerning the meaning of an international treaty."); *Trans World Airlines, Inc.* v. *Franklin Mint Corp.*, 466 U.S. 243, 259 (1984); *Factor* v. *Laubenheimer*, 290 U.S. 276, 295 (1933); *Nielsen* v. *Johnson*, 279 U.S. 47, 52 (1929); *Charlton* v. *Kelly*, 229 U.S. 447, 468 (1913).

In the early years of the aviation industry, when payload weight was the primary limiting factor in long-distance air travel, airlines weighed luggage to ensure the safe operation of aircraft. See Civil Aeronautics Board Order 76-3-81, at 3 (1976). Over time, however, "changes in technology improved the operational characteristics of aircraft to the point where, by and large, the weight of the payload of a full plane does not restrict the range of the aircraft." *Id.* at 3-4. As the original justification for the weighing of bags evaporated, and with the approval of the Executive Branch, airlines stopped weighing bags as a matter of course.

Accordingly, for over 20 years the airlines have had tariffs on file with the Department of Transportation that state in pertinent

part: "For the purpose of determining liability under the convention with respect to passenger baggage acceptable for checking * * * the weight of each piece of such baggage shall be deemed to be the maximum free allowable weight for each piece of such baggage under the Rule unless the actual weight is stated on the passenger's ticket."[6] Thus, the carriers' practice of deeming missing or damaged bags to have weighed the maximum free allowable weight, if the actual weight has not been recorded, has long been known and accepted by the Department of Transportation.

The Department has also approved inter-carrier agreements containing comparable provisions. An agreement adopted by the International Air Transport Association ("IATA") provides in relevant part: "If the weight of the baggage is not recorded on the baggage check, it is presumed that the total weight of the checked baggage does not exceed the applicable free baggage allowance for the class of service concerned, as provided in the Carrier's Regulations." See Recommended Practice 1724 on General Conditions of Carriage (Passengers and Baggage) § 16.3.4. The Department approved that IATA agreement under 49 U.S.C. § 41309(b), which allows approval only when, *inter alia*, "the Secretary finds it is not adverse to the public interest * * *." See U.S. Department of Transportation Order 97-7-4 (1997) (approving procedures for flights outside the U.S.).

Moreover, for almost twenty years the Department of Transportation has advised the traveling public that the airlines' practice is acceptable. The Department's "Consumer Guide to Air Travel" states:

> On international trips, the liability limit is set by a treaty called the Warsaw Convention. Unless you buy excess valuation, the liability limit is $9.07 per pound ($20 per kilo). In order to limit its liability

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[6] Petitioner's tariffs appear at pp. 326 and 337 of the Joint Appendix in the Court of Appeals.

> to this amount, the airline must use one of the following procedures:
>
> 1) The carrier weighs your bags at check-in and records this weight on your ticket. The airline's maximum liability to you is that weight multiplied by $9.07 (or by $20, if the weight was recorded in kilos).
>
> 2) *Instead of weighing your luggage, the carrier assumes that each of your bags weighs the maximum that it agrees to accept as checked baggage, usually 70 pounds (32 kilos). This yields a liability limit of about $640 per bag.*"[7]

This long-standing Executive Department approval of the airlines' practice is entitled to great weight in interpreting Article 4(4). It reflects "the practical construction adopted by the parties," which the Court has held to be a valuable interpretative aid, *Floyd*, 499 U.S. at 535 (citations and internal quotations omitted), and the sort of "flexible implementation of the Convention's terms" that the Court has credited for the Convention's durability. *Franklin Mint*, 466 U.S. at 259; see also *Saks*, 470 U.S. at 403 ("Reference to the conduct of the parties to the Convention and subsequent interpretations of the signatories helps clarify the meaning of the term.").

In short, the court of appeals' conclusion that the Convention's terms were "unyielding" was the cause (and perhaps the result) of its failure to consider and be guided by the Executive Branch's contrary interpretation. As we now show, the court's erroneous ruling has continuing ramifications beyond the case at bar.

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[7] U.S. Department of Transportation, Aviation Consumer Protection Division, *Fly-Rights: A Consumer Guide to Air Travel*, ch. 5, p. 28 (11th rev. ed. 1998) (emphasis added) (also available on the Internet at <http://www.dot.gov/airconsumer/flyrights.htm>). Earlier editions also endorsed the carriers' practice. See, for example, the 8th rev. ed., published in 1982, at 13-14.

III. MONTREAL PROTOCOL NO. 4 DOES NOT DIMINISH THE NEED FOR REVIEW OF THE DECISION BELOW

Although Montreal Protocol No. 4, ratified by the Senate on September 28, 1998 and entered into force on March 4, 1999,[8] relieves airlines of the requirement of recording baggage weight on claim checks, the Court should nevertheless grant review and reverse the erroneous decision below, for both doctrinal and practical reasons.

First, review is warranted because, as the petition points out (at 17), "[t]he cardinal purpose of the Warsaw Convention * * * is to 'achiev[e] uniformity of rules governing claims arising from international air transportation.'" *Tseng*, 525 U.S. at 169 (quoting *Floyd*, 499 U.S. at 552). Yet the decision below exacerbates an already existing conflict among the many courts that have considered the meaning of Article 4(4). As the court of appeals noted, acknowledging the conflict, "it is for the Supreme Court to supply uniformity." Pet. App. 8a.

Second, review is warranted for intensely practical reasons. That is because, if allowed to stand, the decision below foretells massive litigation against the airlines. Although the industry has a superb record of handling baggage – 99.5% of checked bags in domestic transportation reach their intended destination undamaged and on the same flight as their owners[9] – the sheer number of bags conveyed is staggering. In 1999, the airlines

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[8] Montreal Protocol No. 4 to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air, signed at Warsaw on Oct. 12, 1929, as amended by the Protocol Done at the Hague on Sept. 8, 1955, *reprinted in* S. Exec. Rep. No. 105-20 (1998) (incorporating the Hague Protocol's baggage standards).

[9] See U.S. Department of Transportation, *Air Travel Consumer Report* 17 (Feb. 2000). According to ATA statistics, of the 0.5% of bags that are delayed, 80% are returned within 24 hours, and 99% within five days. Only 0.005% of all bags are ultimately lost or stolen.

transported approximately 90 million checked bags in international travel. Assuming that the 99.5% figure applies to international as well as domestic transportation (no comparable figures for international travel exist), the remaining 0.5% translates into about 450,000 passenger reports of delayed, lost, or pilfered baggage each year. *Cf.* U.S. Department of Transportation, *Air Travel Consumer Report* 18 (Feb. 1999). If each of those passengers asserted that their lost bags were worth $5,000 (as the plaintiffs did in the case at bar, see Pet. App. 24a) instead of $640, that would amount to $2.25 billion in baggage claims last year alone.

Although not all mishandled baggage reports lead to claims for compensation, it is clear that the Court's decision whether to issue the writ will impact a huge number of potential cases. Moreover, four putative class actions have been filed against airlines seeking to reopen past baggage claims settled for the amounts of $635 or $640.[10] These suits seek to void potentially thousands of baggage claim settlements on the ground that the Warsaw Convention's liability limitations did not apply because no baggage weights appeared on plaintiffs' baggage checks. There is a risk that similar suits against other airlines, including foreign carriers, may be filed in districts across the country until March of 2001.[11] Thus, besides the actions already pending, an unknown number of future class actions against the airlines may directly rely on the disposition of this case.

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[10] In addition to the case at bar, see *Curtin v. United Airlines, Inc.*, No. 99-CV-3056 (RCL) (D.D.C.); *Lassow v. Northwest Airlines*, No. 99-CV-32689 (GK) (D.D.C.); and *Stevens v. Delta Air Lines, Inc.*, No. 99-CV-3368 (RWR) (D.D.C.).

[11] The Convention's limitations period is two years (see Article 29); March 2001 is two years from the Montreal Protocol's entry into force date.

CONCLUSION

The petition for a writ of certiorari should be granted.

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